

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 08-cr-00491-MSK-01

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. ASHTON PAUL DAIGLE,

Defendant.

**RULE 11(c)(1)(A) and (B) PLEA AGREEMENT AND STATEMENT
OF FACTS RELEVANT TO SENTENCING**

The United States of America, by and through David M. Gaouette, Acting United States Attorney for the District of Colorado, and Jaime A. Pena, Assistant United States Attorney, and the defendant, Ashton Paul Daigle, personally and by counsel, Lawrence Mertes, submit the following Plea Agreement and Statement of Facts Relevant to Sentencing pursuant to D.C.COLO.LCrR 11.1 and Fed. R. Crim. P. 11(c)(1)(A) and (B).

I. PLEA AGREEMENT

Defendant Ashton Paul Daigle agrees to plead guilty to Counts 1 through 5, and Count 109 of the Superseding Indictment charging violations of Title 18, United States Code, Section 1365(a)(4), Tampering with a Consumer Product, and Title 18, United States Code, Section 2, Aiding and Abetting, and Creation of a Counterfeit Controlled Substance in violation of Title 21, United States Code, § 841(a)(2).

The defendant agrees to fully and truthfully cooperate with the Government and law enforcement authorities, which cooperation will include debriefings and testifying before a Court,



jury, and/or Grand Jury whenever called upon or subpoenaed to do so by the Government. It shall also include participating, as directed, in steps to address victim issues regarding (1) the facts and circumstances surrounding the criminal conduct, (2) necessary blood tests to insure the absence of blood born pathogens like HIV or Hepatitis, (3) the disclosure of medical history and tests to the extent it is necessary to inform victims about their potential exposure to pathogens, (4) ceasing to provide medical assistance or care as a health care professional, and (5) the surrender of any license issued by any licensing agency authorizing the defendant to act as a Nurse or in any medical capacity.

The defendant agrees that if the Government can show that he intentionally lied or attempted to mislead the Government and/or law enforcement authorities, or if he intentionally does not fulfill the terms of or does not complete his cooperation under this agreement, then any information and testimony which he has given previously or hereafter in connection with this case can be used in any prosecution against him, notwithstanding the provisions set forth in this Plea Agreement.

This, of course, also means that the information and testimony will not be used against the defendant at sentencing pursuant to §1B1.8, if he continues to cooperate truthfully with the government. Information and testimony relating to involvement in crimes of violence, computer related crimes, or crimes involving minors, if any, are excluded from this agreement. "Crimes of violence," as the term is used here refers to the traditional Common Law meaning of the term.

The Government also agrees to move to dismiss without prejudice the remaining counts of the Superseding Indictment and the original Indictment as to this defendant at the time of the change of plea hearing if the plea is accepted by the Court.

Should defendant meet his obligations as set forth in this agreement, including providing truthful testimony whenever requested by the Government, the Government will recommend a

sentence consistent with this plea agreement of **no less than 54 months**, which will be part of an anticipated variance motion by the Government in its discretion, pursuant to the factors enunciated in 18 U.S.C. § 3553(a). The parties understand that such a recommendation is the maximum recommendation by the Government and that the Government does not support a further departure or variance in this case. The Defendant understands that any recommendation by the Government to the Court is merely a recommendation and the Court will exercise its discretion, within the law, in determining a just sentence. Should the Defendant substantially assist the Government and completely comply with this plea agreement, the Government, in its discretion, anticipates recommending a sentence of **no less than 54 months** incarceration with a 3 year term of Supervised Release with the following terms as special conditions of supervised release:

- (1) The Defendant shall not participate in any activities involving employment in the medical profession;
- (2) No contact with the victims of the offense, unless and until there is an appropriate order of the Court; or for purpose of related civil litigation, if any; and
- (3) The defendant shall participate in testing as directed by the probation office, understanding that the results of such testing may be released to victims of his conduct.

II. ELEMENTS OF THE OFFENSE

The elements of 18 U.S.C. § 1365(a)(4) are as follows:

- (I) With reckless disregard for and extreme indifference;
- (ii) To the risk that another person would be placed in danger of death or bodily injury;
- (iii) The defendant tampered with a consumer product or the container for such

product; and

- (iv) Which consumer product affected interstate or foreign commerce.

The elements of 21 U.S.C. §841(a)(2) are as follows:

- (I) The defendant knowingly and intentionally;
- (ii) created a counterfeit substance.

The term “counterfeit substance” means a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed such substance and which thereby falsely purports or is represented to be the product of, or to have been distributed by, such other manufacturer, distributor, or dispenser. Fentanyl is a Schedule II controlled substance manufactured by Hospira.

III. STATUTORY PENALTIES

The maximum statutory penalty for the violations of Title 18 U.S.C. §1365(a)(4) and Title 18 U.S.C. § 2, Tampering with a Consumer Product and Aiding and Abetting (Counts 1 through 5) is a term of imprisonment of not more than 10 years imprisonment, not more than \$250,000 fine, or both; 3 years supervised release; and a \$100 Special assessment fee. There is no applicable statutory minimum sentence of imprisonment.

The maximum statutory penalty for the violations of Title 21 U.S.C. §841(a)(2), Creating a Counterfeit Controlled Substance (Count 109) is a term of imprisonment of not more than 20 years imprisonment, not more than \$250,000 fine, or both; not less than 3 years supervised release; and a \$100 special assessment fee.

The conviction may cause the loss of civil rights, including but not limited to the rights to possess firearms, vote, hold elected office, and sit on a jury. A violation of the conditions of supervised release may result in a separate prison sentence.

**IV. STIPULATION OF FACTUAL BASIS AND FACTS
RELEVANT TO SENTENCING**

1. The parties agree that there is no dispute as to the material elements that establish a factual basis for the offense for conviction. Pertinent facts are set out below in order to provide a factual basis for the plea and to provide facts that the parties believe are relevant, pursuant to USSG § 1B1.3, for computing the appropriate guideline range. To the extent the parties disagree about the facts relevant to sentencing, the statement of facts identifies those facts known to be in dispute at the time of the plea. USSG § 6B1.4(b).

2. The statement of facts herein does not preclude either party from presenting or arguing, for sentencing purposes, additional facts or factors not included herein that are relevant to the guideline computation, USSG § 1B1.3, or to sentencing in general. USSG § 1B1.4. “[I]n determining the factual basis for the sentence, the Court will consider the stipulation [of the parties], together with the results of the presentence investigation, and any other relevant information.” USSG § 6B1.4, comment.

3. The parties agree that the date on which conduct relevant to the offense (USSG § 1B1.3) began is on or about September 24, 2008 and continued until October 24, 2008, and encompasses all the alleged Counts in the Superseding Indictment. The parties agree that the Government’s evidence would be as follows:

GENERAL STATEMENT OF FACTS

4. Around the middle of September 2008, Ashton Paul Daigle began to use discarded vials and syringes containing Fentanyl that were found in operating rooms throughout Boulder Community Hospital (BCH), Boulder, Colorado, the hospital where he was employed as a registered nurse. Fentanyl, a Scheduled II controlled substance, is a narcotic approximately 80 to 100 times stronger than morphine that is typically used in conjunction with pain management during and after major surgeries. The legitimate Fentanyl in this case was manufactured outside the State of Colorado in either Rocky Mountain, North Carolina or McPherson, Kansas.

5. From the time he was hired in June 2008, Daigle knew that the hospital maintained vials of Fentanyl in its Pyxis machines. Pyxis machines regulate the dispensing of narcotics only to authorized personnel with access codes. Daigle began to access the machines and withdraw Fentanyl between September 24 and October 24, 2008. In order to conceal the fact he was withdrawing Fentanyl from the Pyxis machines, Daigle at first used sterile needles to withdraw the Fentanyl from the vials and replace it with saline solution. He then returned the tampered vials to the Pyxis machine in the original vial with the original labeling representing the vials as containing a specified quantity of Fentanyl, knowing full well he had replaced the contents with saline solution.

6. As his addiction grew and because he was often pressed for time, Daigle also used tap water from a bathroom tap to replace the Fentanyl in the vials. He also began to use the same needle he withdrew the Fentanyl from the original vials to inject himself with the Fentanyl, and in turn used that needle to replace the contents of the vials with either saline solution or unsterile tap water. In order to conceal his conduct he used surgical glue to re-attach the tamper resistant cap onto the adulterated and counterfeited Fentanyl vials just prior to replacing them in the Pyxis machines.

7. Between October 13 and October 17, 2008, Daigle became desperate to receive his fix of Fentanyl and accessed the Pyxis machines multiple times, as many as 25 times in one day. He checked the Pyxis machines for Fentanyl each day, but found that most of the vials in the Pyxis machines were the tampered and adulterated vials he previously replaced. He knew that during this period of time the patients were likely receiving his counterfeit Fentanyl because he used all the legitimate Fentanyl in the machines and noticed it was not replenished at normal levels during that period of time.

8. Ashton Daigle, based on his knowledge, training and experience as a nurse knew that replacing Fentanyl with saline or tap water would result in patients experiencing extreme pain during and after surgery. Similarly, he was aware that replacing the Fentanyl with tap water increased the risk of infection or even death to patients because the tap water was unsterile, subject to contamination, and injected into the patient's blood stream. Finally, Mr. Daigle knew that using needles that were unsterile or previously used increased the risk of blood born pathogens like HIV and Hepatitis to the patients.

9. On or about September 24, 2008, Daigle tampered with and counterfeited two separate vials of Fentanyl, as alleged in Counts 1 and 2 of the Superseding Indictment. On or about September 25, 2008, Daigle tampered with and counterfeited an additional two vials of Fentanyl, as alleged in Counts 3 and 4 of the Superseding Indictment. On or about September 26, 2008, Daigle tampered with and counterfeited at least one vial of Fentanyl as alleged in Count 5 of the Superseding Indictment. On or about October 24, 2008, representatives of BCH recovered from a BCH Pyxis machine a vial of tampered and counterfeit Fentanyl, identified as vial number 1 in the Superseding Indictment, which Daigle counterfeited by replacing its contents with saline or tap water

on or about October 23, 2008, as alleged in Count 109 of the Superseding Indictment.

10. The parties agree that at least five persons, constituting numerous vulnerable victims, received the tainted Fentanyl during the relevant time periods, and that the relevant genuine Fentanyl was manufactured outside the State of Colorado. Also, the parties stipulate the total amount of counterfeited Fentanyl is correctly stated in the Superseding Indictment. Further, there were approximately 290 potential victims of the defendant's conduct in that those persons likely received what was labeled as Fentanyl as part of their treatment for surgery and pain management between September 24 and October 24, 2008.

THE INVESTIGATION

11. On or about October 22, 2008, BCH began investigating the pain medications in their operating rooms (OR) when an anesthesiologist expressed concern that he had given a patient medication and it well-exceeded what the dose should be but was having no effect on the patient. Further investigation by BCH revealed that some of the Fentanyl vials in their Pyxis machines within the ORs did not have a free spinning cap, indicative of tampering.

12. Between October 22, 2008 and October 24, 2008, BCH management and doctors removed approximately 67 suspected Fentanyl vials that appeared to have been tampered with and secured them within their pharmacy. They subsequently sent four of the 64 vials out for testing to MedTox Labs and one vial to Colorado University. MedTox Labs reported all four vials each contained less than 1.94 mcg/mL of Fentanyl. Each vial should have contained 50 mcg/mL. Colorado University reported that the contents of the vial was "Not as Labeled." MedTox Labs returned two of the four vials to BCH. On November 13, 2008, Food and Drug Administration Office of Criminal Investigations (FDA-OCI) took into evidence the 64 Fentanyl vials and

immediately sent them to the Forensic Chemistry Center (FCC) in Cincinnati, Ohio for analysis.

13. On October 23, 2008, the Chief of Anesthesiology reported to the Director of Surgical Services two previous incidents that had been reported to him concerning odd behavior by one of their OR circulating nurses, Ashton Paul Daigle. Continuing on that day, the Director of Pharmacy reported that she reviewed Pyxis reports and found that Daigle had accessed the OR pyxis machines for Fentanyl a significant amount of times utilizing the code "Cancelled Remove".

14. On or about October 24, 2008, BCH management staff met with and terminated Daigle.

15. Further investigation revealed that given the specific job of circulating nurse at BCH, Daigle should have never had a reason to access the Fentanyl. Review of the Pyxis reports revealed that Daigle accessed the Pyxis machines specifically for Fentanyl at least 108 times from September 24 through October 23, 2008, as follows:

DATES OF NUMBER OF

ACCESS TIMES- ACCESS

OF PYXIS

09/24/08	2
09/25/08	2
09/26/08	2
09/29/08	3
09/30/08	1
10/02/08	1
10/03/08	3
10/05/08	1
10/06/08	2
10/07/08	3
10/08/08	8
10/09/08	2
10/10/08	5

10/12/08	3
10/13/08	11
10/14/08	3
10/15/08	13
10/16/08	25
10/17/08	14
10/23/08	4

108

16. On November 21, 2008, the FCC reported that of the 64 vials sent to FCC for analysis, 63 of those contained a glue-like residue on the metallic crimp tops. The contents of 20 vials randomly selected showed all 20 contained a concentration of less than 2 mcg/mL of the labeled 50 mcg/mL Fentanyl. Of the 20 vials examined, 18 vials were determined to have a minimum of 2 punctures on both the top and bottom stopper surfaces characteristic of punctures made by hypodermic syringe needles. All 20 vials randomly tested were the product of tampering.

17. On January 5, 2009, Daigle agreed to take a polygraph examination to demonstrate the veracity of the statements he would provide for a scheduled proffer.

The significant statements provided by Daigle are as follows:

- a. On occasion, Daigle used tap water, not sterile saline solution, to refill some of the vials he tampered with.
- b. On occasion, Daigle did not use sterile needles to refill the vials he tampered with. After injecting himself with the Fentanyl, he would use the same needle to refill the syringe with either tap water or sterile saline solution, and place the vial back in the Pyxis machines.
- c. Daigle did not tamper with, but used Morphine, Versed, Sufentanil and Nubain from BCH.

- d. Daigle did not sell, give, trade or transfer by any means any of the drugs he took to any other individual. The drugs he took were strictly for personal use.
- e. Prior to working at BCH, Daigle worked at a nursing home where he stole prescription controlled substances (pain medications) from the patients.

18. He further detailed his conduct, as follows:

19. In early September 2008, Daigle's wife learned of his use of Vicodin and Percocet that he obtained from Urgent Care. He thereafter stopped going to Urgent Care. To continue his drug use, Daigle used the leftover or "wasted" Fentanyl the doctors left on the operating room carts at BCH. Daigle said the doctors would leave syringes of Fentanyl and Sufentanil on the carts all the time. The doctors logged onto Pyxis machines at a later time and claim they wasted it. Daigle took the Fentanyl that should have been wasted about every other day or as often as the opportunity presented itself. At first, he took the Fentanyl home to use, but after awhile he started using it at work. Usually, he place a small gauge needle on the end of the leftover syringe he found on the cart and sprayed Fentanyl up his nose.

20. Sometimes Daigle took Duramorph (Morphine) that he falsely claimed to have wasted.

21. In late September 2008, Daigle switched to working the night shift. His schedule change reduced the opportunities to take wasted Fentanyl and Sufentanil because most surgeries were during the day shift. Additionally, his tolerance for Fentanyl grew and he switched to taking vials of Fentanyl from the Pyxis machines. To avoid detection of his Fentanyl theft, Daigle obtained empty wasted Fentanyl vials from the operating rooms. He took them to the sink near the

sterilization area outside of the operating rooms and refilled the vials with sterile saline solution. Then Daigle would go to a Pyxis machine, open it, and switch out the genuine one with the tampered vial. At first he only switched out one Fentanyl vial at a time but as time progressed he took up to four vials at once if they were available. Initially, he refilled the vials with sterile saline solution, however, because he did not have much time, he started using tap water from the bathroom sink.

22. Sometimes the anesthesiologists would not log out of Pyxis machines and Daigle would take Fentanyl at that time. He did this only a few times.

23. As his tolerance for Fentanyl grew, Daigle injected the drugs into his leg or hip because spraying the drugs up his nose "was not enough." Around the middle of October 2008, Daigle was injecting about 1000 mcg of Fentanyl three times a day. He used it at work and home. The Fentanyl made him sick to his stomach and he was vomiting about eight times a day.

24. In mid to late October 2008, Daigle recounted how he came to work needing a fix. Upon arriving at work each day, he immediately took about four vials of Fentanyl out of the Pyxis machine, closed the drawer, grabbed a syringe, some Dermabond (Dermabond is a liquid skin adhesive used by doctors to close wounds), some needles from the operating rooms, and went into the bathroom. The bathroom was a single use area he locked to conceal his activities. He withdrew the Fentanyl with a clean needle, injected himself, filled the same syringe with tap water from the bathroom sink and injected the tap water into the used Fentanyl vials. He used Dermabond to glue the caps back onto the vials. It only took about 15 to 20 seconds for the Dermabond to dry. He placed everything back into his pockets, placed the tampered Fentanyl vials back into the Pyxis machine, and threw away everything else in the operating room trash.

25. On or about October 17-19, 2008, Daigle's wife found some syringes and broken

empty ampules of Nubain in their house. Daigle also stole Nubain to help him get through the pain of withdrawals. She confronted him and he admitted his addiction.

26. Daigle was absent from work while he went through withdrawal from October 20-22, 2008. On October 23, 2008 he returned to work, took two 2 mL vials of Fentanyl from a Pyxis machine and injected himself. Daigle said he did not want to mess up his recovery, he just wanted to feel better. However, he stated he felt guilty for doing so and injected himself with Narcan to reverse the effects of the Fentanyl.

27. Although he did not recall specific dates, Daigle confirmed that he went to BCH a few times when he was off duty to take Fentanyl from the Pyxis machines. Noone at BCH questioned his presence during that time.

28. Daigle was shown a spreadsheet detailing the number of times he accessed the Pyxis machines for Fentanyl per date. On the days that he accessed the Pyxis machines more than three or four times, he explained he could not find any Fentanyl with which he had not already tampered. He went from machine to machine looking for Fentanyl vials with lids that spun freely, because he knew the ones that did not have a free spinning top were the ones he tampered with and did not contain Fentanyl. He kept rechecking the Pyxis machines until they were refilled by the pharmacy with genuine Fentanyl.

29. Daigle explained that as a circulating nurse at BCH, he took pre-operative patients' histories, administered Versed, transported the patients to the operating room, hooked up monitoring equipment, helped the anesthesiologists in placing the patients under anesthesia, positioned the patients for surgery, and draped the area of each body receiving an operation. During surgery he remained in the non-sterile area and assisted the surgeons with whatever they needed from

that area. He also maintained the log of events. Daigle drew morphine or any drug the patients needed into a syringe and transferred it to the surgeons. He usually had left over medications he kept under the false premise he would waste it when the procedure was completed. He was never challenged by anyone at BCH for not wasting any medication. Except for the day he was fired, he was never questioned about drug use or the amount of times he accessed the Pyxis machines.

30. On February 2, 2009, in an effort to cooperate with the prosecution, Daigle provided a statement that was video recorded. Daigle confirmed that he sometimes used tap water and re-used needles when refilling the empty Fentanyl vials. Additionally, he addressed the manner in which his crimes were committed. The videotape is submitted to this court as Exhibit "A."

31. On February 12, 2009, a victim list was finalized with approximately 290 potential victims identified. Those victims were patients that had surgery in the affected operating rooms during the time Daigle tampered with the Fentanyl between September 24 and October 24, 2008.

V. SENTENCING COMPUTATION

The parties stipulate that sentencing in this case will be determined by application of the 2008 version of the advisory United States Sentencing Guidelines (USSG), issued pursuant to 28 U.S.C. § 994(a).

The parties understand that the Court may impose any sentence, subject to the mandatory minimum sentence and up to the statutory maximum sentence, regardless of any Guideline range computed, and that the Court is not bound by any position of the parties. USSG § 6B1.4(d). The parties understand that the Sentencing Guidelines are advisory. The Court is free, pursuant to USSG §§ 6A1.3 and 6B1.4, to reach its own findings of facts and sentencing factors considering the parties' stipulations, the presentence investigation, and any other relevant information. USSG § 6B1.4

comment.; USSG § 1B1.4. To the extent the parties disagree about the sentencing factors, the computations below identify the factors that are not in dispute. USSG § 6B1.4(b).

A. The base guideline provision applicable to this offense is USSG § 2N1.1. Therefore, the base offense level is 25.

B There is no aggravating role pursuant to USSG §3B1.1 because the defendant did not direct other persons in the criminal offense. The offense level remains 25.

C. There is an adjustment because of the use of a Special Skill or Abuse of a Position of Public or Private Trust pursuant to USSG §3B1.3. The offense level becomes 27.

D. There is an adjustment because the defendant knew or should have known that the victims of the offense were vulnerable victims because of their physical or mental condition when the tampered products were administered, resulting in a 2 level increase, pursuant to USSG §3A1.1(b)(1), and that there were a large number of vulnerable victims pursuant to §3A1.1(b)(2) resulting in an additional 2 level increase. The offense level becomes 31.

E. Pursuant to USSG § 3E1.1(a), defendant has clearly demonstrated acceptance of responsibility as to the tampering allegations. A three-level downward adjustment results in an offense level of 28.

F. The parties understand that the defendant's criminal history computation is tentative. The criminal history category (CHC) is determined by the Court. At this stage, it appears that the defendant has a limited criminal history, resulting in a CHC of I.

G. The Guideline range resulting from the estimated offense level of 28, and the tentative CHC of I, is 78 to 97 months. However, in order to be as accurate as possible, with the CHC undetermined at this time, the estimated offense level could conceivably result in a range from

78 months (bottom of Category I with a base offense level of 28) to 175 months imprisonment (top of Category VI with a base offense level of 28).

H. Pursuant to USSG § 5E1.2(c)(3), assuming an offense level of 28, the fine range for this offense is \$12,500 to \$125,000.00 plus applicable interest and penalties.

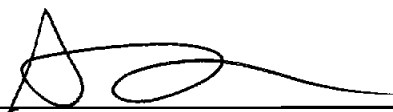
I. Pursuant to 18 U.S.C. § 3583(b)(2), the Court may impose a term of supervised release of up to three years.

V. WHY THE PROPOSED PLEA DISPOSITION IS APPROPRIATE

The parties believe the sentencing range resulting from the proposed plea agreement is appropriate because all relevant conduct directly attributable to this defendant is disclosed, the sentencing guidelines and 18 USC 3553 permit the court to take into account all pertinent sentencing factors with respect to this defendant, and the charges to which the defendant has agreed to plead guilty adequately reflect the seriousness of the actual offense behavior.

This document states the parties' entire agreement. There are no other promises, agreements (or "side agreements"), terms, conditions, understandings or assurances, express or implied. In entering this agreement, neither the government nor the defendant has relied, or is relying, on any terms, promises, conditions or assurances not expressly stated in this agreement.

Date: 6/1/09



Ashton Paul Daigle
Defendant

Date: 6/1/09



Lawrence Mertes
Attorney for Defendant

Date: 6-1-09



Jaime A. Pena
Assistant U.S. Attorney

PENGAD-Bayonne, N.J.

**GOVERNMENT
EXHIBIT**

A